



February 20, 2003

Mr. Steven Falken
Executive Director for GSP
Chairman, GSP Subcommittee
Office of the U.S. Trade Representative
1724 F Street NW, Room F-220
Washington, DC 20508

Re: Thailand GSP IPR Petition for Review
Case: 020-CP-02

To the GSP Subcommittee:

We take this opportunity to update and supplement the public file with respect to the pending petition that was filed by six trade associations (AAP, AFMA, IDSA, MPAA, NMPA and RIAA) on June 13, 2001, in which they requested the initiation of a review of Thailand's intellectual property rights practices under the GSP trade program.

Attached please find IIPA's 2003 Special 301 report on Thailand which we filed with USTR today. This report is also available online at the IIPA website, www.iipa.com.

Sincerely,

Eric H. Smith
President
International Intellectual Property Alliance

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

THAILAND

EXECUTIVE SUMMARY¹

Thailand should be elevated to the Priority Watch List. Optical disc piracy has worsened in Thailand, leaving Thailand a haven for rampant production of pirate discs. An adequate optical disc bill was before the Cabinet a year ago, but a year later, the bill has been weakened and is no closer to passage. There are hopeful signs that a government reshuffle of enforcement responsibilities will improve the situation, and the Thai government has done a laudable job of combating corporate end-user piracy of business software.

For most of the past decade, Thailand has been perennially on the Watch List. In 2002, the U.S. Trade Representative also announced an out-of-cycle review to “focus on Thailand’s progress in passing and implementing a satisfactory optical media bill . . . and most importantly, in launching a sustained enforcement drive against . . . copyright piracy, including optical media and illegal end use of business software.” Six copyright industry groups submitted a petition for the U.S. government to evaluate Thailand’s eligibility to continue receiving trade preferences under the Generalized System of Preferences program. That petition remains pending.

Thailand has failed to pass an effective law to curtail rampant pirate optical disc production. Meanwhile, pirate production has worsened, and the piracy situation remains so dire and penalties so lacking in deterrence that the emboldened pirates have taken to violence against government officials and industry representatives. Cabinet reshuffles have hindered otherwise laudable enforcement efforts by the Economic Crimes Investigation Division. The latest reshuffle in October 2002 bodes well for future enforcement, if the Parliament acts quickly to recognize and properly fund the new “Special Investigation Department” (FBI-Thai). Enforcement efforts against end-user piracy of business software in 2002 were commendable. Copyright law amendments appear no closer to passage than a year ago. Finally, Thailand must cease reclassifying motion picture film imports, inconsistent with Thailand’s bilateral and international obligations.

Required Action for 2003:

- Pass and implement an effective optical disc law by early 2003.
- Maintain the 12 special task forces established in August 2001 for IPR enforcement, and make the Special Investigative Division fully functional in early 2003; this unit should have independent power to investigate in order to supplement the police.
- Conduct hundreds of raids against optical disc factories, warehouses, key distributors and pirate retailers, with prosecutions leading to swift and deterrent sentencing, including of those in financial and/or managerial control of such factories, warehouses and distribution networks.

¹ For more details on Thailand’s Special 301 history, see IIPA’s “History” Appendix to this filing.

THAILAND
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	26.0	70%	24.0	65%	24.0	60%	21.0	55%	19.0	50%
Records & Music ³	30.0	42%	16.6	45%	15.6	45%	6.0	40%	9.1	35%
Business Software Applications ⁴	28.7	75%	32.6	77%	42.7	79%	66.5	81%	39.4	82%
Entertainment Software ⁵	47.3	86%	29.1	93%	130.5	98%	116.3	95%	93.5	92%
Books	28.0	NA	28.0	NA	33.0	NA	33.0	NA	28.0	NA
TOTALS⁶	160.0		130.3		245.8		242.8		189.0	

COPYRIGHT PIRACY IN THAILAND

The piracy situation in Thailand has become dire for copyright owners, with optical disc production for export coming to rival the most egregious pirate producers in the world – like present-day Taiwan or China in the mid-1990s. If the Thai government does not find a solution early in 2003, copyright owners will have no choice but to press for relief through the U.S. government in its trade tools. The most crucial actions to be taken in early 2003 include passage and implementation of a strong optical disc law.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ The piracy level in 2002 represents the "overall" level (for all repertoire) in 2002. The "international" piracy level (just international repertoire) was 65% in 2002.

⁴ BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$38.6 million at 76% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁵ IDSA has revised its methodology for deriving the value of pirate videogame products in-country. IDSA reports that the increase in the value of pirated videogame products in Thailand in 2002 appears to be primarily due to the methodological refinements which allowed it to more comprehensively evaluate the levels of piracy in the personal computer (PC) market, a market segment which rapidly grew during 2002. IDSA's estimates for 2001 do not include production for export but only in-country consumption of pirated entertainment software.

⁶ In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Thailand were \$136.3 million in 2001. Because of the adjustment to reflect BSA's final 2001 statistics (see footnote 4) the estimated total losses to the U.S. copyright-based industries in Thailand in 2001 are adjusted to \$130.3 million.

Pirate Optical Disc Production for Domestic Consumption and Export Continues to Proliferate

The most serious piracy problem in Thailand today remains optical disc piracy: the unauthorized mastering, production, distribution and export of copies of copyrighted materials in formats such as audio compact disc, video compact disc (VCD), Digital Versatile Disc (DVD), and CD-ROMs, which are used to carry entertainment and videogame products, audiovisual works, recorded music and literary material. Thailand is virtually facing an epidemic, representing a serious law-enforcement challenge, since optical disc pirates not only steal from Thai and foreign copyright owners, but engage in a serious organized criminal activity. Increasing evidence links pirate optical disc production in Thailand to foreign criminal organizations.⁷ Foreign investment from known pirate groups is well documented, including investment from Taiwan, Macau, Hong Kong, China and Malaysia. One reason organized criminals engage in piracy is that it yields incredible profits (much like drug dealing or other organized crimes) without the threat of serious penalties applied to other criminals due to lax law enforcement in Thailand. Nonetheless, in 2002, those fighting piracy in Thailand have faced increasing instances of extreme violence, indicating that piracy has sprawled out of control from the standpoint of criminal enforcement.⁸

Thai pirate production, besides completely destroying the domestic market for music, movies, software and literary works,⁹ also now fuels a thriving export trade.¹⁰ Countries as far-flung as Italy, Germany, Sweden and South Africa report that Thailand is a major source of pirated goods seized by their customs officials.¹¹ Disturbingly, optical disc pirates in Thailand have begun the practice of “disc gouging,” namely, tampering with source identifiers used to identify the loci of production of a disc. Industry sources indicate that, as of February 2003, it is

⁷ Syndicates engaged in optical disc piracy have developed strong political ties with local and national figures in Thailand, and their plants are often well protected, both politically and (increasingly) in terms of armaments. The syndicates have developed extensive distribution networks, both for the Thai retail market and for export. Their retail operations, especially for pirate CDs, rely increasingly upon children under the age of 15 to staff stalls and other outlets, since they know that restrictions on the prosecution of juveniles make enforcement more complicated, since juveniles cannot be investigated unless both a police officer and a public prosecutor participate. Some in the Thai government point to the Criminal Procedure Code, Section 113*bis* which was amended and went into force on September 14, 1999 (which states that, in the process of investigation of a juvenile, there must be a video recording of the whole process, an extra burden that makes these investigations almost impossible to carry out). More recently, regular office personnel engage in the distribution of pirated copies to their co-workers in the workplace.

⁸ In November 2002, a record company distributor from Japan was shot in the head, suffering a severe injury. On December 20, 2002, the Deputy Director of the Motion Picture Association in Thailand was struck in the face with a bottle in front of his house before leaving for work. On December 24, 2002, a police officer was beaten by those guarding a pirate retailer. In November 2002, the gas tank of an industry representative's vehicle was found to have been tampered with (filled with brake fluid) during a raid. Threatening phone calls have become the norm for those having the courage to fight piracy in Thailand.

⁹ For example, the motion picture industry reports that sales in 2001 dropped 24% compared with the previous year, and reports that for the first three quarters of 2002, the piracy situation in Thailand has worsened further.

¹⁰ Thailand is a major exporter of manufactured pirate game software.

¹¹ For example, on January 27, 2003 the Customs Authority at Bangkok Airport held quite unknowingly four parcels sent from Chiang-Rai, a Northern Province of Thailand. The goods in those packages turned out to include 9,000 pirate copies of movies and 10,800 pirate music CDs. Officials are conducting, as this report goes to press, further investigations to identify the origin and intended destination of these shipments. What is apparent from these Customs actions is that optical disc production has migrated to remote areas, i.e., near the Thai-Myanmar border, to avoid detection. It is also possible that the products were produced in China and smuggled into the country through the Northern boundary.

verified that there are 51 optical disc production plants having 102 production lines in Thailand. IIPA also has intelligence that indicates there may be up to 90 factories. The total verifiable disc capacity (not including blank CD-Rs) is 357 million discs per year. Meanwhile, the legitimate domestic demand is only an estimated 60 million units per year.¹² Some plants operate in or near Bangkok, while others operate in more remote areas, particularly near the frontiers with Laos, Cambodia, and Burma.¹³ One pirate plant is located directly opposite a major Defense Ministry office in Muangthong Thani, Nonthaburi province. The plants can now easily employ kits to change from CD to VCD to DVD production. As of January 2003, the number of plants capable of replicating pirate DVDs had reached 13 factories having 16 production lines.

Optical Disc and Other Piracy Decimate the Domestic Market in Thailand

Piracy in many forms harms the domestic market in Thailand. Most retail piracy sales spots, including night markets as well as shopping malls, are well known to authorities, and despite constant raiding, continue operations, such as in Mah-boonkrong, Tawanna, Pantip Plaza, Klongtom, Banmore, Nonthaburi Pier, Tawanna, Bang-kapi and Klong Tom.¹⁴ The following are some examples of the cornucopia of pirated goods/services available in Thailand:

- **Pirate Optical Discs Destroy Legitimate Market in Thailand.** Pirate optical discs of motion pictures, entertainment software, music, business software, and literary materials decimate the legitimate market demand in Thailand. For example, pirate “pre-release” DVDs now make up 40% in Thailand, while 70% of the video CDs (VCDs) within the Thai market are pirate (most of these are also “pre-release,” meaning they have not yet been released in Thai cinemas, thereby destroying the theatrical market as well).¹⁵ The going price for pirate VCDs in the night markets or malls is about Bt90 (US\$2-3) and Bt130 (US\$4) for pirate DVDs. Five pirate DVD titles currently sell for Bt500 (US\$12). Pirate music optical discs proliferated in 2002, with pirate sales reportedly tripling in 2002 compared to the previous year.¹⁶ For some entertainment software companies, there was a slight improvement in the market for 2002. Piracy levels are about 86%, with most pirate product being produced domestically. CD-R “burning” of games is also on the rise. Pirated optical discs (including

¹² In 1998, by contrast, there were about ten optical disc plants in Thailand with fifteen to twenty manufacturing lines/machines, having a total capacity of 40 million discs per year. In 1999, there were twenty plants with thirty to forty lines/machines, capable of producing 80 to 120 million discs per year. In 2000, there were approximately 50 plants with 100 replicating machines, capable of producing nearly 200 to 300 million discs per year (legitimate consumption and export in Thailand ran at 15 to 20 million discs per year in 2000).

¹³ As of late 2001, in addition to the known plants there were “underground” plants, including at least two to three plants set up on the border of Thailand and Myanmar, one on the border of Thailand and Cambodia, and one on the border of Thailand and Laos, as well as two plants in Haad-Yai, one in Phuket, and some 15 other plants hiding in the industrial areas, on the outskirts of Bangkok and neighboring provinces, like Nakorn Pratom, Samut-Prakarn, Patumthani, Nonthaburi, Cha-seang-sao, and Samut-Songkram. Industry understands that 80 optical disc “quality control systems” were purchased in 2001 in Thailand. Usually, one plant will own one quality control system.

¹⁴ In the Klong Tom area alone there are now more than 200 retail piracy stalls, up from 90 in 2001.

¹⁵ The damage to the theatrical market is further increased by the fact that 90% of pirate VCDs now have a soundtrack in the Thai language.

¹⁶ Vendors of pirate music CDs have migrated to outlying areas such as Sri Nakharin Road, Rangsit and Bang Khae, as well as traditional markets upcountry such as Phitsanulok, Sukhothai, Chiang Mai, Chiang Rai, Buri Ram and Surin. In 2001, many traders whose businesses had failed due to the economic downturn switched to selling pirated CDs, and continued to do so in 2002.

VCDs and DVDs) are increasingly being imported into Thailand, including games from Cambodia and Laos, and Customs officials have failed to take effective action to curb such pirate imports. Retail piracy of business software is endemic and appears to have grown during 2002.

- **Internet Piracy A Growing Phenomenon.** In recent years, an increasing number of international pirate organizations have established an Internet presence in Thailand through websites that take orders for pirate CDs, CD-ROMs and VCDs.¹⁷ As Internet usage grows in Thailand [there are now 18 Internet Service Providers (ISPs) serving an estimated 3.5 million Internet users in Thailand, representing a tripling in the number of users since 2000],¹⁸ Internet piracy will increase. The recording industry reports that the number of infringing sites containing unauthorized MP3 files is still smaller than those in some neighboring countries, but is on the increase. Most music piracy is still hard-goods, since it is so easy and cheap to purchase pirated CDs from the market. However, IIPA believes that in the future, Internet piracy will increase as the Internet becomes more convenient and inexpensive.
- **Book Piracy Harms Market for U.S. Published Materials, and Other “Analog” Forms of Piracy Are Still Available.** Piracy of published materials, mainly in the form of illegal photocopies of textbooks, but also involving print piracy of entire books, illegal translations, and adaptations, harms the market for U.S. published materials. Such piracy is rampant around all university campuses, including shops near Chulalongkorn University, the most prestigious university in Thailand, Assumption University, a shop at the student cafeteria at Sripatum University, and a shop on the Mahanakorn University campus. Some publishers have had trouble staying in business and have had to cut many previously offered after-sales services, severely restricting publishers’ abilities to contribute to the development of the Thai educational system and economy. Illegal photocopying is tacitly, and sometimes actively, supported by lecturers, and plagiarism on the part of the lecturers is an increasing problem, due to the Thai government’s urging of lecturers to develop their own materials. The Thai government has been extraordinarily reluctant to intervene and demand copyright compliance by university employees and officials. The government needs to take a more active role in ensuring that university officials, lecturers and students respect protected works.¹⁹ Copyshops make the bogus argument that they are not engaged in illegal copying but, rather, are providing a “service” to customers. Increasingly, pirate photocopies of texts and reprints are being exported out of Thailand. The book piracy situation has become so dire in Thailand that it has become a net export business. Combined exports to markets such as Hong Kong and the United States are estimated at over US\$3 million per year. Pirate videocassettes of motion pictures and audiocassettes of music remain available in major shopping areas in Thailand.
- **Cable Piracy and Public Performance Piracy Sap Into Legitimate Market for Motion Pictures.** Cable piracy – the unauthorized transmission of U.S. programming over cable television systems – is widespread in Thailand, especially in rural areas. Illegal decoder boxes and smart cards are widely available. Cable piracy undermines the markets for

¹⁷ The problem of sales of illegally copied games on CD-ROM through websites based in Thailand is on the increase. Gamers and “hackers” are increasingly putting together websites offering free downloads of newly released games.

¹⁸ ITU, Dec. 2002, at http://www.itu.int/ITU-D/ict/statistics/at_glance/Internet01.pdf.

¹⁹ Association of American Publishers members would like to see increased Thai government involvement in 2003 in educational efforts regarding copyright, targeting the general public, grade schools, and universities.

theatrical exhibition, home video, and licensing for broadcast of U.S. motion pictures. Public performance piracy also thrives in Thailand, as many hotels outside Bangkok still transmit unauthorized videos over in-house movie systems, most bars in tourist areas openly exhibit videos without authorization, and a growing number of bars and restaurants have also added “private” rooms to illegally screen U.S. motion pictures. The cable piracy rate, as well as the public performance piracy rate, is estimated at 35%.

- **Good Cooperation from the Thai Government Curtails Corporate End-User Piracy; Some Use of Pirated Software by Businesses and Educational Institutions Remains.** The Business Software Alliance received good cooperation in 2002 from the Thai government in its education and marketing campaigns and on enforcement against the unauthorized use of business software in a commercial setting, so-called “end-user piracy” of business software. As a result of positive activities in 2002, the piracy rate for software in Thailand dropped from 77% in 2001 to 75% in 2002, making it the sixth consecutive year of improvement. Notwithstanding the progress made, corporate end-user piracy remains a problem in Thailand, and raids conducted in 2002 all found evidence of the use of pirated software by businesses. The majority of educational institutions still use pirated software or software without licenses.

COPYRIGHT ENFORCEMENT IN THAILAND

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS ²⁰
Number of Raids conducted	52	479
Number of cases commenced ²¹	50	280
Number of defendants convicted (including guilty pleas)	49	280
Acquittals and Dismissals	1	199 ²²
Number of Cases Pending ²³	19	210
Total number of cases resulting in jail time	31	35
Suspended Prison Terms		
Maximum 6 months	-	32
Over 6 months	3	1
Over 1 year	28	1
Total Suspended Prison Terms	31	34
Prison Terms Served (not suspended)		
Maximum 6 months	-	1
Over 6 months	-	-
Over 1 year	-	-
Total Prison Terms Served (not suspended)	-	1
Number of cases resulting in criminal fines	31	35
Up to \$1,000	3	24
\$1,000 to \$5,000	27	9
Over \$5,000	1	2
Total amount of fines levied ²⁴	\$119,086 (Bt 5,358,900) ²⁵	-

²⁰ These statistics are estimates only, as the data was gathered from manual searches of court files.

²¹ This figure includes ten cases in which the alleged offenders fled the scene of the raid. These ten cases may be dropped at a later time if the alleged offenders are not located.

²² These cases were settled out of court.

²³ This figure does not include cases that have been sent on for appeal.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001		
ACTIONS	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of Raids conducted	16	1,549
Number of cases commenced ²⁶	16	668
Number of defendants convicted (including guilty pleas)	13	1,410
Acquittals and Dismissals	-	881
Number of Cases Pending	5	-
Total number of cases resulting in jail time	11	55
Suspended Prison Terms		
Maximum 6 months	-	47
Over 6 months	-	-
Over 1 year	11	6
Total Suspended Prison Terms	11	53
Prison Terms Served (not suspended)		
Maximum 6 months	-	2
Over 6 months	-	-
Over 1 year	-	-
Total Prison Terms Served (not suspended)	-	2
Number of cases resulting in criminal fines	11	55
Up to \$1,000	-	29
\$1,000 to \$5,000	11	25
Over \$5,000	-	1
Total amount of fines levied	\$48,166 (Bt 2,167,500) ²⁷	-

THAILAND CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS
Number of raids conducted	343	19	461
Number of cases commenced	79	18	164
Number of defendants convicted (including guilty pleas)	89	1	183
Acquittals and dismissals	-		3
Number of cases Pending	3	10	161
Total number of cases resulting in jail time	79	1	30
Suspended prison terms		1	30
Maximum 6 months			22
Over 6 months	34		8
Over 1 year	43		-
Total suspended prison terms	77	1	13 yr. 1 month
Prison terms served (not suspended)			-
Maximum 6 months	1		-
Over 6 months	1		-
Over 1 year			-
Total prison terms served (not suspended)	2		-
Number of cases resulting in criminal fines		1	31

²⁴ This figure reflects all fines levied by the court against the defendants in these cases. These fines include those for Copyright Act infringement as well as all other offences.

²⁵ These monetary figures are historically accurate based on exchange rates at the time.

²⁶ This figure includes four cases in which the alleged offenders fled the scene of the raid. These four cases may be dropped at a later time if the alleged offenders are not located.

²⁷ These monetary figures are historically accurate based on exchange rates at the time.

Up to \$1,000	3		12
\$1,000 to \$5,000	49	1	18
Over \$5,000	25		1
Total amount of fines levied (in US\$)	\$351,032		\$69,788

The Thai government must take steps in 2003 to address mushrooming optical disc production, and the growing fact that organized criminal syndicates are responsible for running much of the illicit production/trade/export of optical discs in 2002. It is crucial that the Thai government have the will and take active steps to curtail and eventually stop pirate optical disc production.²⁸ The enforcement snapshot below demonstrates the practical difficulties the Thai government is having coming to grips with such a serious problem. All the vehicles of the Thai government enforcement regime (the police, the new FBI-Thai, the prosecutors, and the IP & IT Court) must work in tandem to beat back the severe piracy problem, lest Thailand wishes to compete for the dubious distinction of being the world's number one pirate producer of optical discs for export.

Thai Government Reshuffling Leads to Uncertainty, Overall Failure to Make Progress Against Piracy

In late 2001, Gen. Pol. Noppadol Soomboonsupt successfully weeded out retail piracy from many markets.²⁹ Unfortunately, a February 2002 Cabinet reshuffle, in which Gen. Noppadol was removed from his post, resulted in most retail piracy activities returning in full force. In October 2002, the Cabinet was reshuffled again, and a Royal Decree led to the establishment of a new unit, the "Special Investigation Department" ("SID," also known as "FBI-Thai").³⁰ SID, to be headed by Gen. Noppadol, will be responsible for handling intellectual property infringement cases. IIPA hopes that SID may be operational by May 2003, with approximately 1,100 officers. Largely due to uncertainties arising out of the February 2002 Cabinet reshuffle, and the enforcement vacuum that was left in its wake, enforcement results largely waned in 2002. Missing throughout 2002 was a directive from the Prime Minister to all relevant IPR enforcement agencies to prioritize IPR enforcement in Thailand.³¹

Fewer Raids in 2002 Embolden Pirates

²⁸ A recent article indicates that "compact discs" and "computer-program software" will be placed on the Thai government's "controlled-products" list. IIPA hopes that this designation will mean stronger enforcement against piracy in practical terms.

²⁹ To its credit, the Thai government in late 2001 and early 2002 mounted sustained and high profile operations in Pantip Plaza and other infamous shopping areas. Industry cooperated in these raids and the number of shops selling pirated software declined from over 200 to only a handful, with pirate retailers abandoning their shops or leaving product sleeves on the shelves. Some began approaching potential customers in the malls, sometimes holding only blank discs in case the purchaser was a police agent, and only handing over a pirate disc as the customer left the mall. They even resorted to selling by mail order. Another government initiative involved constant police and industry representative presence in malls known to be selling pirate product; however, this practice had only a limited effect on piracy, as the time delay in lodging a complaint and getting a search warrant for a raid proved too cumbersome and resulted in few raids. After the February 2002 Cabinet reshuffle, retail piracy returned full force. Previously clean malls such as the World Trade Centre, Pata Tiklao and IT Zeer now all have shops that stock pirate software.

³⁰ SID will reportedly be in charge of special crime, i.e., terrorism and organized crimes, as well as economic crimes, including intellectual property infringement. According to the Decree establishing SID, all responsibilities of the ECID are transferred to SID under Gen. Lt. Pol. Nopadol Somboonsub, who will act as the first Director-General. However, ECID has not been dissolved to this point and reportedly won't be until SID is fully up and running.

³¹ In August 2002, the Prime Minister mentioned in public that the government policy is to combat piracy.

The Cabinet reshuffle in February 2002 resulted in net fewer raids for the recording industry, even though the number of potential raid targets increased.³² *Ex officio* raids also ceased, since enforcement officials no longer raided based on probable cause, but waited for search warrants to be issued by the courts, causing delays and loss of evidence. The government should reinstate the ability for enforcement authorities to raid retailers selling pirate software on the spot. As a result of waning enforcement activity, the pirates have become emboldened, and have no fear of the Royal Thai Police or industry representatives participating in raids. On many occasions in 2002, right owners and their representatives were threatened and in some cases even physically attacked by pirates and their guards.

Regarding optical disc piracy, the government introduced a new policy to remove equipment used to produce pirate optical discs, exercising this power in 2002 to remove at least two replication lines and equipment from four factory raids. Through September 2002, MPA was involved in raids on three pirate DVD factories and one pirate VCD factory, raising the overall total number of factories raided to 53. Some enforcement against Internet piracy also occurred, as the music industry sent nine cease-and-desist letters in 2001, and 24 letters in 2002; only two positive responses came in 2001 (none in 2002). On August 2, 2002 the Business Software Alliance supported the Economic Crimes Investigation Division in raiding an Internet pirate in Bangkok. The pirate sold pirated discs and pornography to a network of customers all over Thailand, and at the time of the raids, discs were being actively copied on CD-R "burners." The perpetrator was arrested, and over 1,000 pirated discs were seized.

Beginnings of a Coordinated National Enforcement Plan

One of the chief reasons enforcement efforts continue to falter in Thailand is the lack of a national plan to combat piracy. Confusion reigned in the wake of the Cabinet reshuffle in early 2002, exposing the Thai enforcement system as weak and subject to the vagaries of politics. The establishment of SID/FBI Thai was a positive move, but lag time in making the Department operational severely hinders prospects for deterrent enforcement in early 2003.³³ Other departments fail to follow their mandate. For example, the Department of Customs has not demonstrated its willingness to seriously engage in border control of IP infringements. It is also essential to begin involving the Department of Intellectual Property in copyright enforcement to counter-balance the power of the Police, although there are limits to what DIP can do given that they have no authority under the copyright law to conduct raids.³⁴ DIP officials should be

³² For the recording industry, there were 461 raids on 2002 and 59,129 items seized. The recording industry reports that since January 2002, only seven optical disc factories and four warehouses were raided, while only 40 retail raids are being carried out per month, a sharp decrease compared to 2001, when there were 1,567 raids, yielding almost that many arrests, and seizures of over 200,000 items. By contrast, for the motion picture industry, there were 277 raids run in 2001 resulting in seizures of over 500,000 items; of those raids, 13 optical disc factories and 24 warehouses were raided. In 2002, 343 raids were carried out, resulting in less than 400,000 items seized, but disappointingly, of those raids, only 6 were against optical disc factories, 9 against distributors and 18 against warehouses.

³³ As the Act establishing the SID and prescribing the scope of its authority and duties has not yet been enacted, it is still unclear how IPR enforcement will be handled by the new Department. Meanwhile, the ECID has no longer been accepting new cases or complaints filed by IPR owners, instead, only concluding IPR cases which had been filed with the ECID prior to the transfer of authorities. New IPR complaints and cases have had to be filed at the Crime Suppression Division and local police stations, since SID is not fully operational.

³⁴ Since DIP officials have no authority to conduct actions against piracy under the copyright law, DIP should accompany law enforcement or lead law enforcement to conduct raids, as well as coordinate and put pressure on other concerned units to engage in more sustained raiding.

empowered to search, arrest, interrogate, and otherwise investigate piracy cases. In order to combat potential corruption, it is also essential to switch and rotate the various authorities who deal with piracy regularly, in order to retain the integrity of those authorities when dealing with infringers.

IIPA has long been pressing for the development of a national plan giving a higher priority throughout the government, including at the provincial level, to the fight against piracy throughout Thailand. The beginnings of a coordinated enforcement effort emerged in August 2001, when the Prime Minister ordered the creation of the “Committee for Protection and Suppression of Intellectual Property Violations,” chaired by the Minister of the Interior and involving several government departments. Ironically, but not coincidentally, enforcement efforts were set back for months when the Cabinet was reshuffled in February 2002. Even with the establishment of SID/FBI Thai in October 2002, enforcement efforts have not picked up to levels seen in late 2001. Finally, on December 20, 2002, efforts to coordinate enforcement resumed when the Ministry of Commerce (MOC) organized a signing ceremony for a “Memorandum of Understanding on the Cooperation of the Relevant Government Agencies on the Enforcement of Intellectual Property Rights (IPRs),” including 13 government departments.³⁵ The stated objectives of the MOU are to facilitate the efficient enforcement of IPRs, to strictly implement the existing laws and regulations with regard to IPRs, to improve the business environment, and to increase public awareness. Immediate efforts should now be taken by the 12 departments signing the MOU, to fully implement all relevant laws, including the Copyright Law, Customs Law, Tax Law, Consumer Protection Law and the Sticker Price Law, in order to stamp out piracy. IIPA also agrees that increasing public awareness regarding the ills of piracy should be made a priority in 2003.³⁶

Steps Taken Against Institutional End-User Piracy

In 2002, the Business Software Alliance received good cooperation from the Thai government in its education and marketing campaigns and on enforcement against unauthorized use of business software in a commercial setting, so-called “end-user piracy” of business software. Specifically, the Economic Crimes Investigative Division (ECID), prior to its shifting responsibilities (away from copyright) in October 2002, was very helpful to BSA in conducting raids on five companies for suspected use and possession of pirated and unlicensed software. As another example, the ECID section and the Police supported BSA by raiding an Internet pirate in Bangkok, possessing the necessary expertise to collect the forensic evidence from the computers seized during the raid. The Thai government should be commended for its continued vigilance against corporate end-user piracy of business software. Of particular note, the BSA has not had difficulty obtaining search warrants from the Central Intellectual Property

³⁵ The departments participating in the signing of an MOU on “the Cooperation of the Relevant Government Agencies on the Enforcement of Intellectual Property Rights” included the Royal Thai Police, the Office of the Consumer Protection Board, the Customs Department, the Revenue Department, the Excise Department, the Department of Industrial Works, the Department of Foreign Trade, the Department of Internal Trade, the Department of Business Development, the Department of Intellectual Property, the Special Investigation Department, the Metropolitan Electricity Authority, and the Provincial Electricity Authority.

³⁶ It would be most helpful if the government of Thailand set a budget for public awareness and relations campaigns, including educating consumers about the illegality of purchasing pirate copyright material on optical discs, but also, e.g., educating students with regard to book piracy issues, by making it part of the curriculum at the K-12 level, and conducting seminars at the university level; and educating on the need for businesses and educational institutions to ensure that they use only legitimate software. Regarding book piracy, one immediate step that would go far toward solving the problems of publishers in Thailand would be for the government of Thailand to support the establishment of a reprographic rights organization (RRO).

and International Trade Court, usually obtaining them within a couple of hours after a complaint has been lodged.³⁷ The Thai government, in addition to increasing the awareness of end-user software piracy in general and the harm that it does to the economy and the copyright holders,³⁸ has whole-heartedly supported BSA in the Software Asset Management seminars that it has conducted in Thailand, sometimes providing high-profile government officials as speakers to open such events.

Notwithstanding the positive achievements in 2002, corporate end-user piracy remains a problem in Thailand. Raids conducted in 2002 all found evidence of the use of pirated software; only three countries in the Asia Pacific Region have a higher business software piracy rate than Thailand. The majority of educational institutions still use pirated software or software without licenses. The Department of Education should take a lead in sending a strong message that the use of pirated software in educational institutions is wrong and will not be tolerated. It is also noted that, in some cases, the officer performing the end-user raid fails to follow up and prepare cases, for example, by issuing a summons to obtain explanations from the director or IT manager of the company raided (and if such explanations are not satisfactory, by issuing arrest warrants against them). Instead, in most cases, the officer waits almost six months (the maximum period for filing a case at the IP & IT Court) before following up.

Some Systemic Problems Stymie Enforcement Efforts

- **Leaks to Targets Destroy Efficacy of Raid:** Right holders in Thailand have had to face the fact that, the larger the raid, the more likely it is that the target of the raid will be forewarned. This fact certainly implicates Thai authorities to some extent, and is a systemic problem that must be addressed.
- **Destruction or Loss of Evidence in (or After) Raids Hinders Effectiveness of Raids:** Targets often destroy evidence before a raid can be run, sometimes by refusing entry for as little as ten minutes. It is not uncommon for a pirate to use grinding machines, specially designed to destroy CDs, or hidden cameras to detect a possible raid. Another technique used by infringers is to ensure that very few illegal items are kept on the premises at any time, while always keeping some legitimate copies of copyrighted works to show the authorities that they are “clean.” After a raid, right holders have difficulty accessing materials or documents seized by the government for further investigation or review. Such lack of cooperation, coupled with other administrative problems, such as extensive documentation supplied by right holders to investigators disappearing after a raid, further hinders enforcement efforts.³⁹
- **Evasive Techniques of Defendants Lead to Arrest of “Lackeys”:** Another disturbing problem involves the authorities’ preference to close a case when one person has been

³⁷ Such a warrant allows police to enter a suspicious premise and conduct a search and seizure of evidence only in criminal cases under the rules of the Criminal Procedure Code. Although there is no *ex parte* search and seizure order for civil cases, under the Rules of the Establishment of the IP & IT Court, if any party in an IP infringement case fears that evidence of the case might be lost or become difficult to be obtained in the future prior to bringing the case to the court, such party can request that the evidence be seized/attached and examined.

³⁸ In August 2002, the Prime Minister was the chief guest at an anti-piracy event held in a stadium in Bangkok which attracted tens of thousands of spectators and received wide publicity.

³⁹ In late 2001, ECID officers admitted mislaying documentation for ten cases from raids done in 1999, requesting fresh sets of documents.

arrested, rather than seeking the key perpetrator, such as the owner or director of an establishment. Such key players use evasive techniques such as fake names and addresses. Particularly when it comes to optical disc piracy, an organized criminal enterprise, the Thai authorities should be instructed to stay on the case, since it is absolutely essential that the directors, owners, and financiers of such operations be brought to justice.

IP&IT Court Provides Model for the Region, But Must Step Up Efforts to Resolve Procedural Hurdles and Impose Deterrent Sentencing

The inauguration of the Central Intellectual Property and International Trade Court (IP&IT Court) in December 1997 fulfilled a longstanding commitment of the Thai government, and offered the potential to make a real difference in copyright enforcement. The Court's personnel have received specialized training; streamlined procedures have been adopted; and the Court's jurisdiction is broad. Early in its tenure, the IP&IT Court processed cases expeditiously, thus addressing one of the main shortcomings of the old system.⁴⁰

Not only did defendants start serving actual jail time in 2001 as compared to previous suspended sentences, but fines also increased.⁴¹ In that regard, the IP&IT Court has been one of the true success stories in the entire region. Still, the U.S. government should closely monitor the cases still on appeal to ensure that the lower courts' imposition of prison sentences has a deterrent effect. The Court must continue firm sentencing practices, particularly as more operatives from pirate optical disc plants are brought to justice. It should also continue its practice of ordering the forfeiture of optical disc production equipment used to make pirate product, and should extend that forfeiture policy to other cases as well.

One very positive feature of the Copyright Act of Thailand is that it permits a copyright holder to withdraw a criminal case at any time before the court passes judgment. This has proved to be very effective in promoting the settlement of cases, so much so that nearly all cases brought by the Business Software Alliance or its members reach settlement before they enter the court system.⁴² The ability to withdraw cases has been crucial to BSA finding a form of redress that is at once not too costly and effective in spreading the message to companies regarding the negative consequences of engaging in software piracy. Any steps to amend the copyright law to take away this procedure should be resisted and rejected, as they would hinder greatly the business software industry's ability to fight corporate end-user piracy.

One feature of the court system that may be in need of some repair involves the extent to which prosecutors are well trained to handle copyright cases before the court. IIPA has received feedback that some of the public prosecutors slated to handle copyright cases may be unfamiliar with copyright, particularly, with "end-user" piracy of business software. In other

⁴⁰ For the recording industry, in 2002, there were 461 IPR criminal cases in the IP&IT Court, 31 of which resulted in convictions. For the motion picture industry, there were 89 convictions in 2002 including guilty pleas (with 79 cases remained pending in 2002).

⁴¹ A major challenge facing the new court was whether it could break with the traditional inability or unwillingness of judges to impose deterrent penalties, including jail terms, upon convicted pirates in serious cases. In 2002, there were two unsuspended jail sentences meted out in optical disc factory cases, and fines were higher than 2001, totaling more than US\$300,000 in fines. The recording industry had less success, as all the cases resulting in a conviction in 2002 resulted in suspended jail terms and average fines of only about US\$5,000 for each case.

⁴² However, there are notable exceptions where some end-user cases that were raided as far back as 1997 have still not entered the courts. Another end-user case from mid-2000 has also not entered the courts.

cases, just as prosecutors receive training in copyright cases, they are transferred out of their offices. IIPA would like the Thai government to ensure that prosecutors handling copyright cases that receive training have an opportunity to apply that training in bringing cases to fruition through the courts.

In addition, several procedural problems with the IP&IT Court have emerged, and should be addressed forthwith:

- **Lengthy Process to Obtain Search Warrant and Unavailability of Nighttime Searches:** The process of obtaining a search warrant in Thailand can take about a half day, which is lengthy, especially when particularly egregious activities are occurring. Worse yet, courts are extremely reluctant (unless there is an emergency and the court strongly believes that the crime is being committed at that time) to issue warrants for nighttime searches, notwithstanding that most perpetrators commit piracy at night.
- **Burdensome Requirements with Respect to Presumptions of Subsistence of Copyright and Copyright Ownership:** Once a raid has been carried out, copyright owners are being asked to provide all information on the works seized, including all proof of subsistence of copyright as well as proof of ownership, including certificate of incorporation, and powers of attorney translated into Thai. The lack of presumptions (of subsistence and ownership) as applied in these cases should be remedied.
- **Notarization/Legalization Requirement Unduly Burdensome:** Other documentary requirements in the Thai court system simply add to the burdens of right holders in Thailand. The requirement that documents be notarized and legalized is extremely burdensome. Thailand is not party to the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents, and should be encouraged to take steps to become a member.
- **IP&IT Court Should Allow Checks to Pay Fines Be Made Out to Local Representative:** Presently, checks are only issued in the name of the claimant's or victim's company. As many companies do not have representative offices in Thailand, these checks cannot be cashed conveniently, and the process of doing so becomes unnecessarily cumbersome.
- **Court No Longer Allowing Manual Searches of Cases.** Normally, in order to obtain court records, a right holder would send in a request letter, send personnel at its own expense to do a manual search, and request a copy of the record. However, at present, right holders may no longer conduct manual searches, and while the court now has its own personnel to run searches, the staff of the court is overloaded and reluctant to do searches. This creates an extra barrier to obtaining information, and ultimately, to being able to enforce copyright through the courts.

MARKET ACCESS BARRIERS IN THAILAND

Thai Customs Must Cease Reclassifying Motion Picture Film Imports, Unfairly Increasing Duties

Thailand has traditionally classified motion picture imports (which are generally imported in two parts, a 35 mm audio portion and a 35 mm video portion) at a rate of Bt10/meter (US 23.3 cents), and had even promised to reduce the rate to Bt5/meter (US 11.65 cents). Recently,

however, the Thai authorities have reclassified the audio negative (the soundtrack), unduly increasing the rates charged on the importation of motion picture films (specifically, the rate involves a new *ad valorem* duty equivalent to 20% of the box office revenue remitted outside of Thailand on the audio component). The Thai government must cease this reclassification, which may be inconsistent with Thailand's bilateral commitments (with the U.S.) and multilateral commitments (under the WTO tariff schedules) regarding tariffs on motion picture film imports.

COPYRIGHT LAW AND RELATED ISSUES

The Thai government's greatest failure in 2002 was its inability to pass and implement a strong law to curtail optical disc pirate production. In addition, little progress was made in passage of an amended copyright law to provide stronger enforcement measures, and to bring Thailand's copyright system up to date with the latest international standards, including those embodied in the WIPO "Internet" treaties. Enactment of cable regulatory controls is long overdue and is needed to help control cable piracy of IIPA members' audiovisual works. Finally, six copyright associations have an application outstanding to the U.S. government to evaluate whether Thailand continues to qualify for benefits under the Generalized System of Preferences (GSP), given the enormity of the copyright piracy problems in the country.

Passage and Swift Implementation of an Effective Law to Curtail Optical Disc Piracy Must Become a Top Priority

An effective optical disc law in the Thailand will aim to weed out optical disc pirates, through robust licensing and controls over optical disc production, controls on imports of production equipment (including stampers and masters) and raw materials, as well as requirements to use unique source identifiers to track the loci of production.⁴³ In early 2002, a

⁴³ The global copyright community has agreed that the key elements of an effective optical disc law include:

1) Licensing of Facilities: Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained "manufacturer's code" (e.g., SID Code) for optical discs and production parts, licensee take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.

2) Licensing of Export/Import of Materials: Centralized licensing of export of optical discs, and import/export of production parts (including "stampers" and "masters"), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).

3) Requirement to Apply Manufacturer's Code: Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mould for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mould or any disc; selling a production part not marked with manufacturer's code, etc.).

4) License Record Keeping Requirements: Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.

5) Registration Requirement for Commercial Optical Disc Duplication: Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.

6) Plenary Inspection Authority: Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.

7) Search and Seizure Authority: Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.

draft optical disc law reportedly received a stamp of approval by the State Council of Ministers.⁴⁴ However, the Juridical Council has reportedly re-worked the original draft, resulting in a much weaker proposal (which IIPA had not reviewed at the time of this filing).⁴⁵ Furthermore, there is little prospect that even the weakened proposal will become law soon. We note that even if a proposal emerges from the Cabinet, there exist pressure groups in the National Assembly who remain opposed to passage of a law to effectively eradicate optical disc piracy.

IIPA recognizes that a stop-gap measure has been put into place to halt the import of machines for production of optical discs for 12 months, except where their import has been directly certified by a copyright owner.⁴⁶ We applaud the implementation of this measure.

8) Government Record-Keeping Requirements: Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.

9) Criminal Penalties for Violations: Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).

10) Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.

11) Possibility of Closure of a Plant.

⁴⁴ The initial draft was reportedly approved by the Cabinet of Prime Minister Taksin Shinawatra in late 2000. That Bill builds on the recently enacted legislation in Hong Kong and Malaysia, and covers both equipment and raw materials and requires the use of Secure Identification (SID) codes on all optical disc products produced in Thailand. IIPA has had a chance to review a draft from June 2001, but has not fully analyzed later drafts, including the draft that is before the Cabinet. The key features of the June 2001 draft included: a licensing requirement for manufacturers of CDs and other "optical disc products" (including CD-R and CD-RW); requirement that a separate license be obtained for each premise engaging in manufacture; the control of machinery and production of machinery for use in the manufacture of such products; source identification (SID) code requirements for all CDs and other "optical disc products"; and plenary search and seizure authority. Criminal penalties for production of optical discs without a license include up to four years' imprisonment and/or a fine of up to Bt800,000 (approximately US\$18,643). Failure to obtain a license to produce or import machinery is punishable by imprisonment of up to ten years and/or a fine of up to "five times the value of machinery imported and confiscation of the machinery." Lesser penalties are provided for various other offenses. For example, production of optical disc without SID code, or production of optical disc in any place other than that specified in the license, is punishable by up to six months' imprisonment and/or a fine of up to Bt400,000 (approximately US\$9,322). IIPA understands that the latest Bill that is before the State Council resolved some but not all of the known issues. Based on our reading of the earlier draft, we note the following as potential problem areas.

- **There is No Express License Requirement for Production of "Production Parts" (Masters and Stampers)**
- **Grounds for Rejection of Application for License Should Not Be Discretionary:** Section 10 provides for discretionary rejection of an application for a license if: 1) the applicant or related persons have "received final court judgment as being the offender under this Act or the [copyright law]"; 2) the applicant knew or should have known he has committed a copyright law offence at the place specified in the application (regardless of whether anyone has been penalized for that offense); or 3) false statements were made on the application or other document. The grounds set forth should be sufficient for rejecting the application.
- **Transfer of Production License Should Not Be Permitted, or Only Permitted With Prior Approval**
- **Grounds for License Revocation Should Not Be Discretionary (see Discussion of Section 10)**
- **Failure to Report "Plastic Seeds" (i.e., Optical Grade Polycarbonate) Should be Punishable Offense**
- **Forcible Entry of Plant in Inspection/Raid Should Be Provided**
- **Grandfathered Plants Are Apparently Not Subject to Grounds for Rejection of a License; They Should Be**
- **Penalties Should Be Doubled for Recidivists**

⁴⁵ Reports indicate that the Juridical Council was dissatisfied with the draft, making the argument that it contradicted the Constitution regarding the 'freedom of trade and occupation,' and that it was redundant and overlapped existing legislation, namely, the Act on the Importation and Exportation of Goods B.E. 2522 (1979). Fortunately, the Drafting Group has voted to put forward the original version and requested that the Juridical Council speed up its work.

⁴⁶ IIPA understands that on August 10, 2001, the Deputy Minister of Commerce ordered the Department of Foreign Trade to halt the import of machines for production of optical discs for 12 months, except where their import has been directly certified by a copyright owner, and that on November 22, 2001, the Minister of Commerce issued a Ministerial Regulation (Royal Gazette, Gen. Iss. Vol. 119, Sec. 61, January 17, 2002, in force March 17, 2002) on the process to approve the importation of equipment that can potentially be used to infringe copyright. This Regulation appears to be

However, it cannot substitute for a comprehensive optical disc law. IIPA strongly urges that passage of the Bill approved by the Cabinet be given top priority on Thailand's legislative agenda.

Failure to Pass Copyright Law Amendments Leaves Thailand's Copyright Regime Stagnant

In early 2002, a Thai government working group (including the Department of Intellectual Property) indicated that it was likely to embark on amendments to the Copyright Act (last amended in 1995), importantly, to include amendments intended to comply with the WIPO "Internet" treaties, the WCT and WPPT. On March 4, 2002, the Thai government convened a "public consultation" on proposed amendments to the copyright law, including DIP, the Intellectual Property & International Trade Court, copyright owners (local and foreign), academics and members of the Intellectual Property Association of Thailand (IPAT). Subsequent to this consultation, DIP reportedly prepared minor draft copyright amendments (which IIPA has not seen), and thereafter the Juridical Council prepared a more comprehensive draft based on the DIP draft. Public consultations were reportedly scheduled for late 2002. While these reported developments are positive, the process has been less than transparent, and we look forward to the opportunity to provide input from the perspective of the copyright community on this important legislation. It is most important that the Thai government address key aspects of implementing the treaties, by providing express protection for temporary as well as permanent reproductions, and providing an adequate remedy against the act of circumvention of, and the business of trafficking in, technological protection measures used by right owners to protect against unauthorized access to, or unauthorized exercise of rights in, a work.

Since IIPA has not seen the draft prepared by DIP, it is impossible to comment definitively on its content. IIPA understands that the following issues were considered by DIP:

- Whether penalties in the copyright law should be increased. IIPA agrees that penalties on the books, especially fines, in Thailand are non-deterrent on their face.
- Whether Section 66 of the current law, which stipulates that copyright cases may be withdrawn prior to going before the court for judgment, should be repealed. IIPA opposes repealing Section 66, since it could take away the ability of a right holder to withdraw a criminal case before prosecution (in order to settle a criminal case). Such a change could hinder greatly the business software industry's ability to fight corporate end-user piracy, since it frequently withdraws cases prior to judgment as a means to settle claims. If a decision is made to repeal Section 66, the government should ensure that it always remains an option for a right holder and a defendant to enter into mutually agreed-upon terms to dispose of a case outside the courts.
- Whether the law should impose "landlord" liability, i.e., whether the lessors of premises where infringing activities take place should also be made responsible for the unlawful acts of their tenants. IIPA strongly supports the Thai government's implementation of landlord liability to help address blatant retail piracy in shopping malls. Such liability is even more

a positive development, and could potentially be used as a stop-gap means to control the importation of optical disc production equipment. Unfortunately, this stop-gap measure may be proving ineffective against pirate producers, since they are apparently evading the law by bringing in optical disc manufacturing machines in parts.

crucial given the expansion of pirate retail outlets to other shopping malls recently. Just the threat of landlord liability had a deterrent effect in 2002.⁴⁷

Meanwhile, one report indicates that there may be a competing draft amendment to the Copyright Act that sits in a sub-committee below the Cabinet level,⁴⁸ but that sub-committee (the Sub-Committee on Economic Law) includes no representative from DIP, indicating both a lack of cooperation among governmental agencies, and that the Cabinet draft may not incorporate DIP's proposed changes. Again, IIPA has not seen a draft from the sub-committee, so cannot comment definitively, but IIPA understands that the Sub-Committee proposed amending the Copyright Act in several specific areas, including:

- to separate the right to "distribute/sell" from the right to "communicate to the public."⁴⁹
- to grant copyright protection to persons who created work in the course of employment, ordered or controlled by governmental authority.⁵⁰
- to entitle an "exclusive licensee" a right to bring a civil action against infringers for damages lost from copyright infringement.⁵¹

IIPA also notes some other needed changes to the Copyright Act and related laws in order to make enforcement more effective in practice. First, it would greatly enhance the ability to enforce against copyright infringement if intellectual property infringement is made a money laundering offense. Second, in order to combat illicit reproduction of books by copyshops more effectively, the government should amend the Copyright Act to close a loophole argument currently being used by copyshops to get cases against them thrown out of court – namely, the argument that they are merely providing “a service to customers.” Specifically, it should be made an offense ‘to make for sale or hire or reward an infringing copy of a work.’⁵² Such a provision would eliminate the copyshops’ argument. Second, it should be made an offense to possess substantially identical reprographic copies of a copyright work as published in any literary, artistic, or dramatic work capable of reprographic copying.⁵³

⁴⁷ On December 20, 2002, the Deputy Minister of Commerce, Mr. Watana Muangsook, decided to file an offence against landlords who let or sub-let their premises to piracy. After release of this news, the government reported that the sale of illegal products in major areas such as Pantip Plaza and Tawana fell off dramatically.

⁴⁸ A Prime Ministerial Order, Order No. 46/2546, was issued in September 2002, with the objective to simplify the legal code such that laws deemed obsolete or obstructive to the development of the economy, society, politic and administration would be abolished. The Committee on Law Studying was established to review all existing laws for the purpose of carrying out the Order. In the Sub Committee's deliberation, it was decided to reexamine the Copyright Act, but for different reasons than the DIP review.

⁴⁹ The apparent intent of this change would be to provide for a “first-sale”-type doctrine (national exhaustion) as to physical copies of works that are distributed. Since the rental right and the “communication to the public” right would then separately be provided for, IIPA assumes that those rights would not be subject to national exhaustion.

⁵⁰ It is presumed that the addition of a provision dealing with works commissioned by the government will have no effect on provisions dealing with ownership of a work, for example, Section 10 (which provides, “Copyright in a work created on a commission shall vest in the employer”).

⁵¹ IIPA would have no problem with such a provision, as long as the copyright owner reserves the right to bring suit.

⁵² The government of the Hong Kong SAR has recognized such a problem, and has proposed a similar fix in its Copyright (Amendment) Bill 2002, draft clause 2, § 118(1)(a).

⁵³ The government of the Hong Kong SAR has similarly recognized the need to strengthen enforcement against copyshops illegally reproducing books, and has introduced a similar prohibition in its Copyright (Amendment) Bill 2002, draft clause 2, § 118C. The Association of American Publishers has commented favorably on the proposed Hong Kong provision (with some specific reservations).

Thailand, which participated actively in the negotiations that led to the adoption of the World Intellectual Property Organization treaties (the WIPO Copyright Treaty, WCT, and the WIPO Performances and Phonograms Treaty, WPPT), should move promptly to ratify and implement those treaties. The WIPO treaties provide copyright owners with the rights they need to protect their works in the digital environment, and protect technological protection measures used by copyright owners to protect their works. The WCT went into force on March 6, 2002, while the WPPT went into force on May 20, 2002. By updating its copyright regime for the digital age, Thailand would position itself as a leader within the APEC and ASEAN communities in the adoption and implementation of modern intellectual property regimes.⁵⁴

Questions Regarding Liability of ISPs Unresolved

Many questions with respect to the law concerning ISPs remain unresolved. A law dealing with ISPs in Thailand has been enacted,⁵⁵ and went into force in early 2000, but the National Telecommunication Business Commission (NTBC), responsible for implementing the provisions of that law, has not been established. Currently, ISPs operate their business under agreements made with the Communications Authority of Thailand (CAT). ISPs must comply with contractual agreements with CAT, requiring the ISPs to control, verify, or warn their customers not to use their services in ways that contradict any laws. Regarding an ISP's duty to take down infringing material, at present, ISPs are not obligated to immediately remove or take down an infringing website, but the police and copyright owners may request an ISP to remove an infringing website from its system when there is evidence of infringement. The police may also request ISPs to provide information regarding the identity of the persons operating a website when such information is required for investigation or when there is evidence of infringement.

Enactment of Cable Regulatory Controls and Broadcast Legislation is Long Overdue

Enactment of cable regulatory controls and broadcast legislation is long overdue and is necessary to afford protection for the broadcast, transmission and retransmission of copyrighted programming. Although the copyright law can be used against cable pirates, a regulatory system would make it easier to control cable piracy by conditioning the issuance and retention of cable licenses on compliance with copyright as in other countries. The government agency that issues and renews cable TV licenses, the Public Relations Department, currently does not enforce copyright compliance as a licensing condition. The PRD claims it does not have a mandate to enforce intellectual property rights, and that such responsibility falls to the Department of Intellectual Property. The PRD should take appropriate steps to ensure copyright compliance when issuing or renewing TV licenses.

⁵⁴ Coming out of the October 2002 APEC Ministerial in Los Cabos, Mexico, was the "Statement to Implement APEC Policies on Trade and the Digital Economy" (Leaders' Statement), including the following statement regarding WIPO treaties ratification/implementation:

[APEC Member Economies] will ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as soon as possible. If an Economy is a non-Member of WIPO, it will implement the provisions of these treaties as soon as possible. For any Economy in the process of reviewing accession or implementation, it will commit to completing that review as soon as possible.

⁵⁵ Act on Organizations Allocating Frequency Waves and Supervising Radio/Television Broadcasting and Telecommunication Business B.E. 2543 (2000).

The draft broadcast legislation contains provisions prohibiting signal theft and the production or distribution of signal theft-related devices, punishable by up to one year imprisonment and a fine of up to Bt2 million (US\$46,800). Stronger penalties are needed if this law is to be effective. Unfortunately, the Bill is still pending. Other legislation passed in January 2000 – the Frequencies Management Act – created a National Broadcasting Commission, but selection of its members has been delayed.⁵⁶ The cable Bill is unlikely to make any forward progress until the National Broadcasting Commission is formed. This commission should be appointed promptly and given the authority to fight cable piracy, and to guide policies on commercial issues including foreign investment and advertising restrictions. Foreign investment in pay television is presently capped at 25% and should be increased. In addition, the ban on advertising on pay television should be removed.

Generalized System of Preferences

Thailand currently enjoys benefits under the Generalized System of Preferences (GSP) program, a U.S. trade program which affords duty-free entry to many of a country's imported goods, subject to the requirement that it provide "adequate and effective" copyright protection. In June 2001, six copyright-based associations – Association of American Publishers, Inc. (AAP), AFMA, Interactive Digital Software Association (IDSA), Motion Picture Association of America, Inc. (MPAA), National Music Publishers' Association, Inc. (NMPA), and Recording Industry Association of America, Inc. (RIAA) – submitted a request that the eligibility of Thailand as a GSP beneficiary country be reviewed, and that its benefits be suspended or withdrawn if Thailand fails to remedy the deficiencies which adversely affect U.S. copyright owners.⁵⁷ Those deficiencies include: the growing optical disc piracy problem in Thailand; the lack of effective optical disc legislation and cable regulatory controls/broadcast legislation; the failure to aggressively pursue criminal prosecutions in the copyright area; the failure to impose more deterrent sentencing by the courts; and the failure to pay adequate attention to Internet piracy trends in Thailand. In the first 11 months of 2002, \$2.1 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program (approximately 15.5% of its total exports to the U.S.).⁵⁸

⁵⁶ The National Communication Resource Management Board has not yet completed its process of forming the Commission due to the fact that the proposed board was rejected by an Administrative Court. According to sources, the Commission is not expected to be set in place for at least another year.

⁵⁷ Thailand has been subject to a prior GSP IPR review. In January 1989, President Reagan revoked some of Thailand's GSP trade benefits for its failure to provide adequate and effective copyright protection and enforcement. After Thailand made progress in adopting a new copyright law and creating a specialized IPR court, GSP benefits were partially restored in August 1995. In June 1998, the U.S. restored virtually all of Thailand's GSP benefits as the Thai government committed to an ambitious action plan for better enforcement against piracy.

⁵⁸ In 2001, \$2.1 billion in duty-free goods entered the U.S. from Thailand duty free under the GSP Program (approximately 15% of its total exports to the U.S.).